IN THE

Supreme Court of the United States

October Term, 1960

No. 373

ROY R. TORCASO,

Appellant,

v.

CLAYTON K. WATKINS,
Clerk of the Circuit Court
for Montgomery County, Maryland,

Appellee.

On Appeal from the Court of Appeals of Maryland

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	PAGE
Jurisdictional Statement	1
Opinions Below	2
Jurisdiction	2
Statute Involved	3
Questions Presented	3
Statement of the Facts	4
The Questions Presented Are Substantial	6
Conclusion	18
Appendix "A"—Opinion of the Court of Appeals of Maryland	20
Appendix "B"—Opinion of the Circuit Court for Montgomery County	29

TABLE OF AUTHORITIES

Cases:

Adamson v. California, 332 U. S. 46	3
Brown v. Board of Education, 347 U. S. 483	15
Cantwell v. Connecticut, 310 U. S. 296	11
Everson v. Board of Education, 330 U. S. 1	6, 7, 9, 12

PAGE

First Unitarian Church v. County of Los Angeles, 357 U. S. 545 13
Fowler v. Rhode Island, 345 U. S. 67 9

Konigsberg v. State Bar of California, 353 U. S. 252 ..... 13, 15
Kunz v. New York, 340 U. S. 290 11

McCollum v. Board of Education, 333 U. S. 203 ..... 6, 7

Railway Express Agency v. Virginia, 282 U. S. 440 3
Reynolds v. U. S., 98 U. S. 145 12

Schware v. Board of Bar Examiners, 353 U. S. 232 15
Slochower v. Board of Education, 350 U. S. 551 13
Speiser v. Randall, 357 U. S. 513 ..... 13, 15
Summers, in re, 325 U. S. 568 ..... 13, 15

United Public Workers v. Mitchell, 330 U. S. 75 ..... 13, 14
United States v. Ballard, 322 U. S. 78 11

Washington Ethical Culture Society v. District of Columbia, 249 F. 2d 127 8
West Virginia Board of Education v. Barnette, 319 U. S. 624 ..... 11, 15
Wieman v. Updegraff, 344 U. S. 183 ..... 13, 14

Zorach v. Clauson, 343 U. S. 306 17

Statutes and Texts:

Alabaster, "The Wheel of the Law" 8

Constitution of Arkansas, Art. 19, Sec. 1 17

	PAGE
Constitution of Maryland:	
Art. I, Sec. 6	2
Art. IV, Sec. 1	1
Declaration of Rights:	
Art. 37	3
Constitution of Pennsylvania:	
Art. 1, Sec. 4	17
Constitution of Tennessee:	
Art. IX, Sec. 2	17
Constitution of the United States:	
Art. VI, Sec. 3	10
First Amendment	3, 4, 6, 10
Fourteenth Amendment	3, 4, 6, 10, 14
Henig, "Virginia Statutes at Large"	12, 16
Rhys-Davis, "Religious System of the World"	8
Spielberg, "Living Religions of the World"	8
Stokes, I "Church and State in the United States"	10
Swancara, 18 St. Louis Law Review 105	16
United States Code, Title 28, Sec. 1257(2)	3
World Almanac (1959)	8

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v.

CLAYTON K. WATKINS,
Clerk of the Circuit Court
for Montgomery County, Maryland,

Appellee.

On Appeal from the Court of Appeals of Maryland

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Appeals of Maryland entered on June 30, 1960, in which the Court of Appeals of Maryland affirmed the judgment of the Circuit Court for Montgomery County, Maryland, entered on November 18, 1959. The Court of Appeals of Maryland is the highest state court available to appellant. Maryland Constitution, Art. IV, Sec. 1.

Opinions Below

The opinion of the Court of Appeals of Maryland, dated June 30, 1960, is not yet reported. (A copy of the opinion and judgment of the Maryland Court of Appeals is attached hereto as Appendix A.) The opinion of the Montgomery County, Maryland, Circuit Court, is not yet reported. (A copy of the Circuit Court memorandum opinion and order is attached hereto as Appendix B.).

Jurisdiction

On August 13, 1959, Appellant filed a petition for writ of mandamus in the Circuit Court for Montgomery County, Maryland, praying that a writ be issued directed to Appellee as Clerk of the Circuit Court for Montgomery County, commanding him to perform his duties as Clerk of that Court and to issue to Appellant his commission as Notary Public in and for Montgomery County, State of Maryland, upon his taking the oath of affirmation set forth in Article I, Section 6 of the Maryland Constitution. R. 2-6. Appellee demurred to the petition. R. 8-9. On November 18, 1959, after hearing on the demurrer, the Circuit Court for Montgomery County issued its memorandum opinion and order denying and dismissing the petition. R. 10-13.

On Appellant's appeal, the Maryland Court of Appeals, by opinion and judgment filed on June 30, 1960, affirmed the judgment of the Circuit Court. R. 16-19.

On August 3, 1960, Appellant filed in the Court of Appeals of Maryland its Notice of Appeal to this Court. An amended Notice of Appeal was filed on August 16, 1960.

The jurisdiction of the Supreme Court to review the judgment of the Supreme Court of Maryland is conferred by 28 U. S. C. §1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Railway Express Agency* v. *Virginia*, 282 U. S. 440; *Adamson* v. *California*, 332 U. S. 46, 48.

Statute Involved

Article 37 of the Declaration of Rights of the Maryland Constitution, the validity of which is drawn in question, provides as follows:

> That no religious test ought ever be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution.

Questions Presented

Is that portion of Article 37, Declaration of Rights, Maryland Constitution which, as interpreted by the Maryland Court of Appeals, requires "a declaration of belief in the existence of God" as a "religious test" for an "office of profit or trust," in conflict with the Constitution of the United States, specifically:

1. The ban in the First Amendment, made applicable to the states by the Fourteenth Amendment, on laws respecting an establishment of religion?

2. The provision in the First Amendment, made applicable to the states by the Fourteenth Amendment protecting the free exercise of religion?

3. The due process and equal protection clauses of the Fourteenth Amendment?

4. The ban on religious tests in Article VI?

Statement of the Facts

The undisputed facts of this case, as set forth in the Petition, to which Appellee demurred, are as follows:

Appellant, a citizen of the United States of America and resident of Montgomery County, State of Maryland, made a proper application for a commission as a Notary Public in and for Montgomery County. His application was properly endorsed by the Honorable Edward S. Northrop, State Senator for Montgomery County, and forwarded by him to the Governor of the State. On or about the 22nd of June, 1959, the Governor appointed Appellant a Notary Public in and for Montgomery County, State of Maryland.

In accordance with instructions received from the Office of the Secretary of State, Appellant went to the office of the Clerk of the Circuit Court for Montgomery County to obtain his commission and qualify for office. At this time, Appellee requested Appellant to take and subscribe to the following oath and declaration:

State of Maryland, Montgomery County ss:

In the presence of Almighty God, I, Roy R. Torcaso, do solemnly promise and declare that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully without partiality or prejudice execute the office of

Notary Public of
The State of Maryland
in and for
Montgomery County

according to the Constitution and Laws of this State.

I, Roy R. Torcaso, do declare that I believe in the existence of God.

_____

Sworn to and subscribed before me, Clerk of the Circuit Court for Montgomery County, at Rockville, Maryland, this —— day of ———— AD, 19——.

TEST:

_____Clerk

Appellant stated that he would not declare his belief in the existence of God. Thereupon, Appellee refused to render the Commission to Appellant.

The federal questions here presented were first raised in paragraph 12 of Appellant's pleading before the Circuit Court for Montgomery County, Maryland (R. 5) and his claim was denied by the decision of that court in the penultimate paragraph of its opinion (R. 13). Appellant's claim was then presented to the Maryland Court of Appeals and denied in the decision of that court. R. 23-28.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Maryland Constitution, as construed by the Maryland Court of Appeals, restricts the holding of public office to those willing to declare a belief in the existence of God. Appellant, qualified in all other respects for the position of Notary Public, declines to subscribe to such a declaration for the reason that he does not believe in the existence of God.

It is Appellant's position that a state cannot constitutionally require its office-holders to profess any religious belief or disbelief.

I. Eligibility for a State office conditioned upon a belief in the existence of God constitutes a law respecting an establishment of religion in violation of the First Amendment, made applicable to the States by the Fourteenth Amendment.

In *Everson* v. *Board of Education*, 330 U. S. 1, and again in *McCollum* v. *Board of Education*, 333 U. S. 203, this Court spelled out in detail the meaning of the ban on laws respecting an establishment of religion. In both cases, the Court stated:

> The "establishment of religion" clause of the Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (*Everson* case, 330 U. S. at pp. 15-16; *McCollum* case, 333 U. S. at pp. 210-211).

In these cases the Court expressly held that the Constitution imposes upon both the Federal and State governments a mandate of neutrality not merely as among competing faiths but as between belief and non-belief. In the *Everson* case, the Court stated that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers" (330 U. S. at p. 18).

We submit that the requirement of a belief in the existence of God as a condition of holding public office violates the ban on establishment of religion in the First Amendment, first, because it prefers one or some religions over others; second, because it aids religion as against non-

religion and thus transgresses the mandate of neutrality; and third, because historically, the imposition of a religious test has always been considered a major form of establishment of religion.

The requirement of a belief in the existence of God prefers some religions over others, specifically theistic religions over those which are non-theistic.

It is frequently assumed that all religions are founded upon a belief in the existence of a personal God or at least of some "God" no matter how that term is defined. This is not so. So great a religion as the Buddhist religion with over 150 million adherents throughout the world including the United States (*World Almanac*, 1959, p. 715) is not founded upon a belief in the existence of God. Rhys-Davis, "Buddhism," in *Religious Systems of the World*, p. 142; Spielberg, *Living Religions of the World*, p. 247; Alabaster, *The Wheel of the Law*, p. XXXVII.

In *Washington Ethical Culture Society* v. *District of Columbia*, 249 F. 2d 127, the United States Court of Appeals for the District of Columbia held unanimously that the Ethical Culture Society is a religious society and that Ethical Culture is a religion although it does not require "a belief in and teaching of a Supreme Being who controls the universe." The Court ruled that a statute granting tax exemption to "religious societies" must be construed to include the Ethical Culture Society. Indeed, the Court said "To construe exemptions so strictly that unorthodox or minority forms of worship would be denied the exemption benefits granted to those conforming to majority beliefs may well raise constitutional issues."

It is clear, therefore, that in fact and in law belief in the existence of God is not an indispensable element of

religion and that the validity of a religion does not in law depend upon its commitment to a Supreme Being. It follows from this that a law favoring theistic over non-theistic religions constitutes preferential treatment forbidden by the prohibition of laws respecting an establishment of religion. Such a law is no less barred by the First Amendment than one requiring a belief in Christianity, or in Trinitarian Christianity, or in Protestant Christianity. *Fowler* v. *Rhode Island*, 345 U. S. 67.

What is true of permission to use public parks for worship or meetings as in *Fowler*, is equally true of the right of non-theists to be considered along with other citizens for public office. If, as the Court has decided, preferential treatment of conventional as against unconventional and minority religions is unconstitutional in respect to the first type of preferment, we submit it is no less unconstitutional in respect to the second.

The obligations of the First Amendment are not satisfied by according governmental favors to all religions equally. The limitations of the Amendment are transgressed when the State singles out religious groups for preferential treatment over comparable non-religious groups. *Everson* case, *supra*.

It is hardly open to serious challenge that the imposition of a religious test for public office constitutes substantial and direct governmental aid to religion. Here is not involved a minimal or indirect benefit, but one which historically has been at the very root of establishment. Indeed, if there is any one test of an established church it is that the state officials or at least chief state officials are members of that church. The Anglican Chuch is established in England because the sovereign of England is and must be a member of that church. The same is true

of the Lutheran Church in the Scandinavian countries and of established churches in all countries.

This certainly has been the history of establishments in the United States. For example, it was not until 1806 that the State of New York abolished its test oath for citizenship aimed at Catholics, an oath requiring the applicant to abjure all foreign allegiances in matters "ecclesiastical as well as civil." 1 Stokes, *Church and State in the United States*, 406. This oath barred Roman Catholics from citizenship as effectively as the oath involved in the present case bars Buddhists, Ethical Culturists, and other non-theists from public office in the State of Maryland.

It was because the fathers of our Federal Constitution were determined to insure religious freedom and terminate all vestiges of an established religion that they declared that "no religious test shall ever be required as a qualification to any office or public trust under the United States." United States Constitution, Art. VI, Section 3. The debates in the Constitutional Convention and in the ratifying conventions and legislatures establish this beyond any doubt.

Since the prohibition against the establishment of religion is now applicable to the States by virtue of the Fourteenth Amendment, we submit that so too is the prohibition of religious tests for public office, which is an unseverable element in the prohibition against establishment of religion.

II. Eligibility for a State office conditioned upon a belief in the existence of God constitutes a law prohibiting the free exercise of religion in violation of the First Amendment, made applicable to the States by the Fourteenth Amendment.

The protection of the religious freedom guaranty of the First Amendment extends to minority, unpopular and unconventional beliefs. *Cantwell* v. *Connecticut*, 310 U. S. 296; *Kunz* v. *New York*, 340 U. S. 290; *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624; *United States* v. *Ballard*, 322 U. S. 78, 86. It follows from this that the fact that the Appellant's views are non-theistic does not deprive him of the guarantees of the First Amendment. That Amendment protects the Buddhist, Ethical Culturist and other non-theists no less than the Protestant, Roman Catholic and Jew.

There can be no doubt that the religious freedom guaranteed by the First Amendment to the Federal Constitution does not embrace absolute "freedom to act," and all conduct "remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut*, *supra*, at 303-304. But this case does not involve conduct. The oath required of Roy Torcaso is limited exclusively to belief. One thing can be said for certain: If there is any right in a democratic society that can be said to be absolute it is the right of religious belief. As the Supreme Court said in *Cantwell*, *supra*, at 303: "Thus the [First] Amendment embraces two concepts—freedom to believe and freedom to act. *The first is absolute* * * *." (Emphasis added.)

A disqualification for public office because of religious belief or non-belief constitutes an impairment of religious liberty and an interference with the free exercise of religion. Historically, along with compulsory taxation for religion, disqualification for public office was, prior to the establishment of our Constitution, the most common means of impairing religious freedom. It is no accident that

Jefferson's great Virginia Statute Establishing Religious Freedom, upon which the First Amendment is based (*Reynolds* v. *United States*, 98 U. S. 145; *Everson* case, *supra*), addressed itself to disqualification for public office. The preamble of the Statute states:

> "That our civil rights have no dependence on our religious opinions, any more than on our opinions in physics or geometry; that therefore *the proscribing of any citizen as unworthy of public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion*, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right; that it tends only to corrupt the principle of that religion it is meant to encourage by bribing with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it * * *." 12 Henig, Virginia Statutes at Large 84. (Emphasis added.)

The operative section of the Statute provided that "no man * * * shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, *and that the same shall in no wise diminish, enlarge or affect their civil capacities.*" (*Ibid.* Emphasis added.)

So committed to this principle was the Virginia legislature that it added a postscript to the Statute that "the rights hereby asserted are of the natural rights of man-

kind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such will be an infringement of natural right." (*Ibid.*)

This Court has held that if a state conditions tax exemption on a non-exercise of First Amendment liberties, it is in a constitutional sense imposing a punishment for the exercise of such liberties. If the right to public employment is conditioned on the non-exercise of Fifth Amendment liberties, then the state is punishing for the exercise of such liberties. *Speiser* v. *Randall*, 357 U. S. 513, 518; *First Unitarian Church* v. *County of Los Angeles*, 357 U. S. 545; *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 273; *Slochower* v. *Board of Education*, 350 U. S. 551, 558. See Mr. Justice Frankfurter concurring in *Wieman* v. *Updegraff*, 344 U. S. 183, 195. In each of these cases the Fourteenth Amendment was held to provide the force to strike down a state activity punishing the exercise of a right guaranteed by the Bill of Rights. There is no question but that the right sought to be exercised by Appellant is transmitted undiluted from the First Amendment through the Fourteenth Amendment and restricts the states precisely as it restricts the Federal Government.

This Court has recognized that disqualification for public office on the ground of religious belief violates the Bill of Rights. No one can deny, the Court said in *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100, that "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to Federal office, or that no Federal employee shall attend Mass or tak any active part in missionary work.'"

The same principle was stated by this Court *In re Summers*, 325 U. S. 568, where the Court said (at p. 571):

> • • • It is said that the action of the Supreme Court of Illinois is contrary to the principles of that portion of the First Amendment which guarantees the free exercise of religion. Of course, under our Constitutional system, men could not be excluded from the practice of law, or indeed from following any other calling, simply because they belong to any of our religious groups, whether Protestant, Catholic, Quaker or Jewish, assuming it conceivable that any state of the Union would draw such a religious line.

III. Disqualification of an otherwise qualified applicant for State office solely for refusal to declare a belief in the existence of God deprives him of liberty without due process of law and denies him the equal protection of the laws in violation of the Fourteenth Amendment.

As its opinion indicates, the court below relied for its decision on the assertion that appointment to the office of notary public "is a privilege." But this fact does not empower the State of Maryland to act arbitrarily in the granting or withholding of the privilege. The mandate of the Fourteenth Amendment that no State shall deny to any person the equal protection of the laws bars it from granting privileges to some persons which it withholds from others unless a constitutionally reasonable distinction can be made between those favored and those not favored.

The claim that public employment or office is a privilege within the uncontrolled power of the State to grant or withhold was asserted in *Wieman* v. *Updegraff*, 344 U. S. 183, and rejected there by a unanimous Court. In its opinion the Court stated:

> • • • To draw • • • the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. For, in *United*

> *Public Workers* v. *Mitchell*, though we held that the Federal Government through the Hatch Act could properly bar its employees from certain types of political activity thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to Federal office, or that no Federal employee shall attend Mass or take any active part in missionary work." * * * We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to statute is patently arbitrary or discriminatory.

Admission to the bar may likewise be considered to be a privilege. An attorney is an officer of the court at least as much as a notary public is. Yet that fact does not empower a State to withhold the privilege of admission to the bar on religious grounds. (*In re Summers, supra.*) Nor may it withhold the privilege on political grounds (*Konigsberg* v. *State Bar of California*, 353 U. S. 252; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232) or for other arbitrary and unjustifiable reasons.

The grant of exemption from taxation is likewise a privilege. But again a State may not act discriminatorily in granting or withholding the privilege. *Speiser* v. *Randall*, 357 U. S. 513. Attendance at a free public school can hardly be deemed a common law or constitutional right; yet it can hardly be denied that a State may not discriminate among children on the basis of religion in granting or withholding the privilege. *West Virginia Board of Education* v. *Barnette, supra; Brown* v. *Board of Education*, 347 U. S. 483.

The basic principle is that, in the granting or withholding of benefits, whether they be termed rights or privileges, the State may not discriminate among its citizens or make distinctions among them except where clearly necessary to protect an interest within the constitutional competence of the State to protect.

We submit that the furtherance of a religious purpose is not within the constitutional competence of a State in view of the restrictions of the First Amendment as made applicable to the States by the Fourteenth. As Jefferson's Virginia Statute points out, religion is corrupted not aided "by bribing with a monopoly of worldly honors and emoluments those who will externally profess and conform to it." But even if the method of withholding public office from those refusing to profess a belief in the existence of God were effective, it would still be beyond the constitutional competence of the State of Maryland to employ that method. The net result is that discrimination on the basis of religious belief or non-belief in the granting or withholding of public office is by its very nature a deprivation of liberty without due process of law and a denial of the equal protection of the law.

IV. Because of the nation-wide significance of this case and the substantiality of the constitutional questions herein involved, this Court should take jurisdiction of this case on appeal.

At this country's inception, most states imposed religious tests for public office. (Citations to early state constitutions may be found in Swancara, "The Surviving Religious Test," 18 *St. Louis L. Rev.* 105, 107 (1933).) Most states have stricken such provisions from their constitutions. However, in addition to that of Maryland, the

constitutions of Arkansas (Art. 19, §1), Pennsylvania (Art. 1, §4), and Tennessee (Article IX, §2) presently require acknowledgment of "the being of a God" in order to hold public office.

In these states, and in any other that decides to return to the restrictive days of established religion, members of various religious organizations, as well as atheists and agnostics, are disqualified from public office on account of their religious beliefs. The populace at large is deprived of the services of these people and of opportunities to choose them for elective office.

If a state can require a belief in the "existence" or "being" of God, then it is surely competent to define the God that must be believed in. E.g., it may choose between Trinitarian and Unitarian concepts.

This case comes to this Court as a case of first impression. The questions presented have not been decided by the highest court of any state except Maryland. The Maryland Court of Appeals relies for its view that this Court will uphold religious tests for public office primarily on the comment in *Zorach* v. *Clauson*, 343 U. S. 306, 313 that "We are a religious people whose institutions presuppose a Supreme Being." It is important that the states with existing religious tests for public office be advised of the extent, if any, to which such tests may be enforced consonant with the United States Constitution.

CONCLUSION

The questions presented by this appeal are substantial and of public importance. The case is one of first impression. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

Opinion by Henderson, J.

IN THE

COURT OF APPEALS OF MARYLAND

No. 199

September Term, 1959

ROY R. TORCASO,

v.

CLAYTON K. WATKINS,
Clerk of the Circuit Court for Montgomery County

Brune, C. J.
Henderson
Hammond
Prescott
Horney, JJ.

Brune, C.J. concurs in the result

Filed: June 30, 1960

Appendix A

This appeal is from an order of the Circuit Court for Montgomery County dismissing a petition for mandamus against the Clerk of that court, after a demurrer to the petition had been sustained. The petition alleged, and the demurrer admitted, that the appellant, a citizen of the United States and a resident of Montgomery County for more than two years past, had been duly appointed by the Governor a notary public in and for that County, but when he went to the Clerk's office to obtain his commission and qualify for the office, the Clerk requested him to take and subscribe to a certain oath and declaration. The appellant declined to do so. Thereupon, the appellee refused to deliver the commission to the appellant, and suit followed.

The oath and declaration tendered to him read as follows:

"State of Maryland, Montgomery County ss:

In the presence of Almighty God, I, Roy R. Torcaso, do solemnly promise and declare that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully without partiality or prejudice execute the office of

Notary Public of
The State of Maryland
In and For
Montgomery County

and according to the Constitution and Laws of this State.

Appendix A

I, Roy R. Torcaso, do declare that I believe in the existence of God.

_____

Sworn to and subscribed before me, Clerk of the Circuit Court for Montgomery County, at Rockville, Maryland, this —— day of ———— AD, 19——.

TEST:

————————Clerk"

The appellant stated that he was prepared to take the oath of affirmation prescribed by the Maryland Constitution, but refused to declare his belief in the existence of God.

The oath and declaration quoted above differs from that prescribed by Art. 1, sec. 6 of the Maryland Constitution, for all persons elected or appointed to "any office of profit or trust, under this Constitution, or under the Laws, made pursuant thereto," in two particulars. The prescribed oath, or affirmation, begins with the phrase "I, ..., do swear, (or affirm, as the case may be,)," and it omits the separate declaration as to belief in the existence of God. It is conceded that the office of notary public is an office of profit or trust, referred to in Art. IV, sec. 45 of the Constitution, and dealt with in Code (1957), Art. 68, secs. 1-10. Sec. 1 provides that applicants shall "take the oath of office before the clerk of the circuit court for each of the counties in the State * * *." The reference here, as in Code (1957) Art. 70, sec. 7, is to the oath prescribed by the Constitution. Art. 37 of the Declaration of Rights provides:

"That no religious test ought ever to be required as a qualification for any office of profit or trust in

this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution."

In *Davidson* v. *Brice*, 91 Md. 681 (1900), this Court held that the Legislature had no power to require a different or supplemental oath of office, in the case of a county treasurer. Chief Judge McSherry, for the Court, said (p. 691): "Art. 37 does two things. It prohibits any religious test as a qualification for any office of profit and trust, other than a declaration of belief in the existence of God; and it prohibits any oath of office other than the one set forth in sec. 6, Art. 1, except as respects the Comptroller and Treasurer." But the opinion throws no light on the questions now raised. We may note in passing that the form of oath presented to the applicant, which did not follow the language of the Constitution giving him an option to swear or affirm, was improper. But the appellant's main contentions are (1) that a declaration of belief in the existence of God, although permitted by Article 37 as an exception to the general rule against the requiring of a religious test as a qualification for office, has never been put into effect by the Legislature, and (2) that, if the exception is self-executing under Article 37 of the Declaration of Rights, it is invalid as in violation of the Fourteenth Amendment to the Federal Constitution.

On the first point, we must agree that there is no present Maryland statute implementing the exception stated in Article 37. Code (1957), Art. 70, sec. 9, provides: "It shall only be necessary for an officer who is required to take and subscribe the oath prescribed by the sixth section of the first article of the Constitution to declare orally at the time his belief in the Christian religion, or, if he profess to be a Jew, of his belief in a future state of rewards and punishments; and it shall be presumed that an officer who

has taken and subscribed the oath made at the same time such declaration of belief." This section was enacted by Chapter 18, sec. 1, Acts of 1854, and has been included without change in succeeding codifications, including those of 1860 and 1888, which, unlike other codifications, were not merely evidence of existing laws, but legislative enactments of the matter therein contained. However, the section in question obviously referred to the religious tests set forth in the Constitution of 1851; which were deleted in the Constitution of 1867. The section makes no reference to belief in the existence of God, which is the only religious test now permitted. To the extent that sec. 9 refers to tests now forbidden, it can have no application in the instant case.

We think, however, that sec. 9 is significant for another reason. Its obvious purpose was to permit an oral declaration, and to raise a presumption of compliance with the constitutional requirements of belief in effect at the time of its enactment. In short, it assumed those requirements to be mandatory and self-executing, and merely undertook to prescribe the mode of compliance or the quantum of proof. Moreover, the language of all the constitutional provisions in effect prior to 1867 seemed to differentiate between the oath and the declaration. In the Declaration of Rights adopted in 1776, Art. 35 read: "That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this State, and such oath of office, as shall be directed by this Convention, or the Legislature of this State, and a declaration of a belief in the Christian religion." Clearly, the Legislature was empowered to prescribe additional oaths of office, but there is no suggestion that the Legislature could dispense with the oath of support and fidelity, or the declaration of belief. Art. 34 of the Declaration of Rights of 1851 added a clause after the words "Christian religion," stating: "and if the party

shall profess to be a Jew, the declaration shall be of his belief in a future state of rewards and punishments." Art. 37 of the Declaration of Rights of 1864 substituted a clause after the words "Christian religion," stating: "or in the existence of God, and in a future state of rewards and punishments," omitting the specific reference to Jews.

In the proceedings of the convention of 1867, Article 37 of the Declaration of Rights was reported from the committee in the exact language of Art. 37 of the Declaration of Rights of 1864. Mr. Brown advocated striking out of the constitution "any religious qualification whatever." Mr. Bernard Carter then submitted a substitute that was adopted: "That no religious test ought ever to be required as a qualification for any office of profit or trust in this State; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this constitution." This was amended, on motion of Mr. Mackubin by adding after the word "State": "other than a [declaration of] belief in the existence of God." See Perlman, *Debates*, pp. 81, 173. In the context, and in the light of the historical development, we think the Convention was itself declaring that belief in the existence of God should be a qualification for office, but that no other religious test should be required.

We do not agree with the appellant that the word "ought" was used in a permissive sense. The word occurs repeatedly in the Declaration of Rights, in many instances to establish fundamental rights. It is a general rule that constitutional provisions are not given a directory construction. See *Archer* v. *State*, 74 Md. 443, 448. In *State* v. *C. & P. R. R. Co.*, 40 Md. 22, 50, Judge Alvey, with reference to the language of Art. 15, that every person "ought to contribute his proportion of public taxes * * * according to his actual worth * * *," said: "* * * this declaration of the right of the citizen is not simply directory to the Legis-

lature, * * * it is a positive limitation or restriction on the power * * *." It could hardly be contended, in the instant case, that Article 37 would permit the Legislature to impose religious tests other than belief in God. The real question is whether the one permitted test required further legislative action. We entertain no doubt on that score. The provision is complete in itself and needs no legislative enactment to carry it into effect or provide means for its enforcement. Cf. *Leser* v. *Lowenstein*, 129 Md. 244, 252. See also 11 Am. Jur., *Constitutional Law*, §75.

We also attach significance to the fact that there appears to be a long and unbroken administrative construction, whereby a declaration of belief in God has been required as a qualification for office in Maryland. Unfortunately, the record does not disclose the contemperaneous practice in 1867. But the practice was clearly recognized by Attorney General Armstrong in 1922, when he ruled that it was necessary that every official should be "required in some definite way" to declare his belief in the existence of God. 7 Op. Atty. Gen. 486.

We come, then, to the question whether the declaration in question violates the Federal Constitution. It is well settled that the provisions of the Federal Constitution are supreme, even over a provision of the State Constitution. *Baltimore Radio Show, Inc.* v. *State*, 193 Md. 300, 323. The appellant does not contend that clause three of Art. VI of the Federal Constitution is applicable to the states. That clause, providing that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States," is plainly inapplicable. Nor is it contended that this clause could be imported into the Fourteenth Amendment. Obviously, Congress could not prescribe qualifications for state office, at least not so long as we retain a Federal form of government. However, it is well settled that the First Amendment, providing that

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, * * *," is applicable to the states through the Fourteenth Amendment, as a deprivation of "life, liberty, or property, without due process of law," or a denial of "the equal protection of the laws." *Hopkins* v. *State*, 193 Md. 489, 496; *Hanauer* v. *Elkins, Pres., U. of Md.*, 217 Md. 213, 219. The appellant contends, in effect, that the State Constitutional qualification deprives him of his "liberty" to disbelieve in God, and discriminates against him as a non-believer.

We are referred to no case directly in point. In general, the cases distinguish between a right to believe, and a right to act on one's belief. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *Craig* v. *State*, 220 Md. 590, 599. The first is absolute, the second is not. The petitioner is not compelled to believe or disbelieve, under threat of punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office. The Fourteenth Amendment does not prevent the states from establishing qualifications for office, at least where the qualifications are not based on such an unreasonable and improper classification as to be discriminatory. Cf. *Snowden* v. *Hughes*, 321 U. S. 1, *Wieman* v. *Updegraff*, 344 U. S. 183, and *Slochower* v. *Board of Education*, 350 U. S. 551. In the flag salute case, *Board of Education* v. *Barnette*, 319 U. S. 624, overruling *Minersville Dist.* v. *Gobitis*, 310 U. S. 586, some stress was laid upon the fact that school attendance was compulsory, and criminal penalties were imposed for non-attendance. Stress was also laid upon the lack of any showing of substantial or apparent relation to the public welfare, in the requirement of a salute to the flag of the United States.

In the absence of any direct authority on the point, we find it difficult to believe that the Supreme Court will hold

that a declaration of belief in the existence of God, required by Article 37 of our Declaration of Rights as a qualification for State office, is discriminatory and invalid. As Mr. Justice Douglas, speaking for a majority of the Court in *Zorach* v. *Clauson*, 343 U. S. 306, 313, said: "We are a religious people whose institutions presuppose a Supreme Being." The problem here is more basic than in any of the cases cited. An oath, predicated upon a belief in God, is a regular incident of judicial proceedings. There can be no doubt that at common law an atheist was incompetent as a witness. See Rapalje, *Witnesses*, §113 Wharton, *Criminal Evidence* (12th ed.), §750; 6 Wigmore, *Evidence* (3d ed.), §§1816-1828. See also *Atwood* v. *Walton*, 7 Conn. 66 (1828); *Thurstow* v. *Whitney*, 2 Cush. (Mass.) 104 (1848); *United States* v. *Miller*, 236 Fed. 798 (D. C., Wash.). There has been no constitutional or statutory abrogation of the common law rule in this State.

Article 39 of our Declaration of Rights provides: "That the manner of administering an oath or affirmation to any person, ought to be such as those of the religious persuasion, profession, or denomination, of which he is a member, generally esteem the most effectual confirmation by the attestation of the Divine Being." Article 21 provides that in all criminal prosecutions an accused shall have a right "to examine the witnesses for and against him on oath." It might well be contended that a person convicted upon unsworn testimony, or the testimony of an atheist, would be deprived of due process, or trial according to the "law of the land." Article 36 provides that "as it is the duty of every man to worship God in such manner as he thinks best acceptable to Him, all persons are equally entitled to protection in their religious liberty; * * * nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that under

His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come." To the members of the Convention, as to the voters who adopted our Constitution, belief in God was equated with a belief in moral accountability and the sanctity of an oath. We may assume that there may be permissible differences in the individual's conception of God. But it seems clear that under our Constitution disbelief in a Supreme Being, and the denial of any moral accountability for conduct, not only renders a person incompetent to hold public office, but to give testimony, or serve as a juror. The historical record makes it clear that religious toleration, in which this State has taken pride, was never thought to encompass the ungodly.

The Federal Constitution itself is not lacking in references to an oath, or affirmation, as a qualification for office. See Art. I, sec. 3; Art. II, sec. 1; Art. VI, and Amendment IV. See also 5 U. S. C. A., §16. It would appear to be somewhat paradoxical if a Notary Public, who is given the power to administer oaths and certify thereto, under Code (1957), Art. 68, sec. 3 (see also Maryland Rule 5 c, and Code (1957), Art. 1, secs. 10, 11), might qualify for the office even if he disavowed belief in God and in the sanctity of the very oaths he administers. If it be assumed, as has been suggested, that the real deterrent to false swearing in our time, is not the belief in God but the fear of prosecution for perjury, we cannot say that the distinction between believers and non-believers is so patently inappropriate as a security for good conduct, as to make it invidious under the Fourteenth Amendment.

ORDER AFFIRMED, WITH COSTS.

APPENDIX B

Memorandum Opinion and Order

Law No. 9155

IN THE

CIRCUIT COURT OF MONTGOMERY COUNTY

MARYLAND

ROY R. TORCASO,

Plaintiff,

vs.

CLAYTON K. WATKINS,
Clerk of the Circuit Court
for Montgomery County, Maryland,

Defendant.

This is a Petition for a Writ of Mandamus filed by Roy R. Torcaso praying that Clayton K. Watkins, as Clerk of the Circuit Court for Montgomery County, Maryland, be commanded to issue to said petitioner his commission as a Notary Public in this State and County.

The defendant Clerk has filed a Demurrer through the Attorney General of Maryland and argument was had on this Demurrer on November 3rd, 1959, and Counsel for the petitioner and the Clerk have both filed briefs. Also the American Civil Liberties Union, as amicus curiae, has filed a memorandum in support of the petitioner's position,

by permission of the Court. All briefs have been read, as have the cases cited, and the matter has been carefully considered.

The petitioner alleges that he was refused his commission by the Clerk by reason of the fact that he would not take and subscribe the oath administered as follows: "In the presence of Almighty God, I, Roy R. Torcaso, do solemnly promise and declare that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully without partiality or prejudice execute the office of Notary Public of the State of Maryland in and for Montgomery County according to the Constitution and Laws of this State. I, Roy R. Torcaso, do declare that I believe in the existence of God." He claims that the oath required is in violation of the Constitution of Maryland and of the United States of America. The office involved is one created by Statute and the petitioner concedes that such an office is one of profit and trust; the oath is one always administered for like positions, and there is no dispute as to the facts involved.

In Maryland, Article 37 of the Declaration of Rights is a restriction applicable to those who wish to hold a position of profit or trust in this State. This restriction is a qualifying condition and seems most assuredly to be one which may be rightly imposed by a sovereign state in dealing with its own officials. This is a test for qualification, as are tests for qualification in other states, and also in dealing with such matters as defense when accused of crime, marriage and divorce laws, qualification to practice a profession; likewise in enjoyment of such privileges as attendance at State Universities and the use of public school buses, matters within the police powers of the state, and those of

internal administration. In dealing with subversive activities, our own case of *Shub* vs. *Simpson* at 196 Md. 177 clearly points out that Article 37 did not violate the oath of office prescribed by the Constitution since it was simply a declaration showing qualification for office and not an additional oath.

Maryland is a State steeped in religious freedom, founded and guided by those who believe in the existence of God. The members of the Legislature from the date of our founding have imposed some religious restriction on the right to hold an office of profit or trust. First, in 1776 the Declaration of Rights, at Article 35 stated that "no other test of qualification ought to be required on admission to any office of profit or trust than that of support and fidelity to this State and such oath of office as shall be directed by this Convention or the Legislature of this State and the declaration of belief in the Christian Religion." In 1851, at Article 34 of the Declaration of Rights, the restrictions were broadened to read, "and the declaration of belief in the Christian Religion; and if the party shall profess to be a Jew, his declaration shall be of his belief in a future state of reward and punishment," so that all faiths in addition to the Christian were then qualified. Now, any who believe in a supreme being may qualify. In the Convention of 1876, after much debate, all old provisions giving to the Legislature the right to exact oaths were deleted but the declaration of belief in the existence of God was retained so that Article 37 reads today as follows: "That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution." This matter is fully discussed in *Davidson* vs. *Brice*, 91 Md. 681, which is a case involving the office of County Treasurer of Anne Arundel County.

Appendix B

The office of Notary Public is an important one of profit and trust, and an entire Article of the Annotated Code of Maryland—Article 68—is devoted to this office and duties included therein. A Notary issues oaths in accordance with the law, gives certificates, receives proof of acknowledgments of all instruments of commerce, navigation, deeds and other paper writings: he can issue protests and must keep official records of his accounts. His is a privilege, and it being solely an internal office, the people of Maryland have imposed a qualification of belief in the existence of God as a condition precedent to the taking of his oath. The foundation for such a requirement was made clear when the Constitution of Maryland was adopted by Convention in Annapolis. The Preamble to the Constitution reads as follows: "We, the People of the State of Maryland, grateful to Almighty God for our civil and religious liberty, and taking into our serious consideration the best means of establishing a good Constitution in this State for the sure foundation and more permanent security thereof, declare:" (then follows Art. 1, etc.)

The Petitioner also argues that Article 37 violates the provision of the 1st and 14th Amendments to the Constitution of the United States. Suffice it to say, for reasons hereinbefore stated, the statutes which forbid acts detrimental to the community and places requirements for public office do not forbid religious beliefs, or even disbeliefs. The Complainant, Torcaso can continue his religious position without any interference from Maryland, either as to his present private employment or his citizenship, as neither is being interfered with.

The Court finds no conflict with the United States Constitution or the Constitution of Maryland and no authority having been cited to the contrary, the Court feels that Art. 37 of the Declaration of Rights of Maryland imposes

a qualification that the petitioner has not met and his petition for Writ of Mandamus will be, and the same is hereby, denied and the Petition is hereby dismissed.

Ralph G. Shure
JUDGE of the Circuit Court
for Montgomery County, Maryland